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No. 92-1437

In the Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE ROBERT WALLACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a corporation's property is "taken by fraud" for purposes of 18 U.S.C. 2314 when the corporation makes a payment based upon invoices that intentionally misrepresent the services rendered.

2. Whether the lower courts correctly determined that the prosecutors did not intentionally elicit perjury in order to avoid an acquittal.

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OCTOBER TERM, 1992

No. 92-1437

EUGENE ROBERT WALLACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 979 F.2d 912.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1992. A petition for rehearing was denied on January 15, 1993. Pet. App. A20. The petition for a writ of certiorari was filed on March 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, petitioner agreed to assist Wedtech, a small privately held metal parts manufacturer in the South Bronx, New York, in obtaining contracts with the Department of Defense. His role was to contact his close friend Edwin Meese III, then Counselor to President Ronald Reagan, and seek assistance for the company.[1] Between May 1981 and the end of 1984, petitioner sent memoranda to Meese or his subordinates regarding an Army contract for the production of small engines and other Wedtech matters. In September 1982, the Army awarded the small engine contract to Wedtech. Petitioner told Wedtech officials that he was primarily responsible for the company's obtaining the award. *United States* v. *Wallach*, 935 F.2d 445, 450 (2d Cir. 1991) (*Wallach I*).

In late 1982, petitioner asked Wedtech for $200,000 as payment for his continued services during the end of 1982 and 1983,[2] and he sent Wedtech a proposed consulting agreement. Wedtech officials told petitioner that the company's financial difficulties precluded it from entering into the agreement at that time. As an alternative, however, Wedtech offered petitioner stock from its initial public offering, which was planned for later in 1983. Petitioner continued to work with Wedtech. He successfully lobbied the Economic Development Agency of the Department of Commerce, with assistance from Meese and Meese's staff, in order to

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[1] Wedtech was part of the Small Business Administration's Section 8(a) program under which businesses owned by economically and socially disadvantaged minorities are eligible for government contracts without competitive bidding. *United States* v. *Wallach*, 935 F.2d 445, 450 (2d Cir. 1991).

[2] Petitioner had not received any compensation from Wedtech for his prior services.

enable Wedtech to obtain a bank loan that would provide the company with working capital until it went public. Wedtech's initial public offering took place in August 1983. *Wallach I*, 935 F.2d at 451.

Shortly thereafter, petitioner again asked Wedtech to pay him for his lobbying efforts. He agreed to accept $125,000. At Wedtech's request, he submitted a letter to the company stating that the payment was for "consultation relative to the registration and public offering." Attributing the payment to the public offering enabled Wedtech to capitalize, rather than expense, the payment. That device inflated Wedtech's profits per share, resulting in the inclusion of false information in its filings with the SEC. Wedtech paid petitioner $125,000 on September 7, 1983. *Wallach I*, 935 F.2d at 451.

In January 1984, petitioner and Wedtech entered into a contract under which petitioner would be paid $150,000 per year. In February 1984, Wedtech paid petitioner $150,000 for his services in 1984. In September 1984, Wedtech agreed to prepay petitioner $300,000 for his lobbying services for 1985 and 1986. The parties agreed that petitioner would submit a letter falsely attributing that payment to services performed for the company's acquisition of a shipyard in Michigan, an acquisition that occurred during the summer of 1984. Wedtech agreed to the $300,000 prepayment after petitioner told the company that he anticipated being offered and accepting a position in the United States Department of Justice under then-Attorney General Meese, and that he would be unable to accept payment from Wedtech once he was so employed. Petitioner also told Wedtech that he wished to continue to lobby for Wedtech while working at the Department of Justice. In the end, however, petitioner did not obtain a position in the Justice Department. *Wallach I*, 935 F.2d at 452-453.

Wedtech issued a check to petitioner for $300,000 on October 26, 1984, after which petitioner submitted his billing letter. The letter again resulted in an inflated statement of Wedtech's earnings and false filings with the SEC. Wedtech filed for bankruptcy in December 1986. *Wallach I*, 935 F.2d at 452-453.

2. Petitioner was indicted on two counts of racketeering, in violation of 18 U.S.C. 1962(c) and (d), three counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314, and one count of conspiring to violate the conflict of interest law and to defraud the United States, in violation of 18 U.S.C. 371. He was convicted by a jury of one substantive RICO violation, two counts of interstate transportation of stolen property, and the conspiracy charge; he was acquitted on the remaining two counts. Petitioner's two co-defendants were also convicted. *Wallach I*, 935 F.2d at 452, 454-455. Petitioner was sentenced to six years' imprisonment and a $250,000 fine, and he was ordered to forfeit $425,000. Gov't C.A. Br. 1-2.

3. At trial, one of the government's key witnesses was Anthony Guariglia, the former president of Wedtech and a member of its board of directors. Guariglia testified on direct examination that although he had been a frequent gambler, he had stopped gambling in the summer of 1988 at the direction of the United States Attorney's Office and because he had realized that he was "hooked" on gambling. On cross-examination, however, Guariglia admitted that he had signed gambling markers in the amount of $65,000 at the Tropicana, a casino in Atlantic City, in September and October of 1988. He nonetheless denied that he had been gambling on those two occasions. *Wallach I*, 935 F.2d at 455-456.

On redirect examination, Guariglia explained that he had cashed in chips on the first marker in order to pay off a debt, and that he had given the chips from the second

marker to a friend.[3] He again denied gambling. Petitioner sought to proffer evidence from a manager at the Tropicana that certain casino records identified Guariglia as having placed bets there in October 1988. The district court held that this was extrinsic evidence offered to impeach Guariglia and sustained the government's objection to its introduction under Fed. R. Evid. 608(b). *Wallach I*, 935 F.2d at 456.

Following petitioner's conviction, the government obtained new evidence, unrelated to the Tropicana markers, that Guariglia had gambled at a different casino in Puerto Rico in November 1988. Guariglia was indicted and convicted of perjury based on his false denial of gambling during the *Wallach* trial. See *United States* v. *Guariglia*, 962 F.2d 160 (2d Cir. 1992).

3. The district court denied petitioner's motion for a new trial based upon Guariglia's perjury. The court held that there was "neither allegation nor evidence that the prosecution had any knowledge" of the perjury. *Wallach I*, 935 F.2d at 456-457.

The court of appeals reversed. It held that the government "should have known" that Guariglia was committing perjury when he claimed he had stopped gambling. The court applied the standard that where the prosecution knew or should have known of the perjury, the conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." The court also stated that it "fear[ed]" that the government "may have consciously avoided recognizing the obvious" because of the

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[3] Prior to rehabilitating Guariglia on redirect examination, the government questioned him thoroughly and obtained corroborating statements from individuals who had been with him at the Tropicana. *Wallach I*, 935 F.2d at 457.

importance of Guariglia's testimony. *Wallach I*, 935 F.2d at 456-457; Pet. App. A4-A5.

As an alternative holding, the court of appeals held that even assuming the government was unaware of the perjury during the trial, reversal was warranted because the jury "probably" would have acquitted petitioner had it known about the perjury. The court noted that Guariglia's testimony, and thus his credibility, were essential to the government's case. Because Guariglia's false testimony regarding his gambling "directly call[ed] into question the veracity of the rest of his statements," the court held that the jury probably would have altered its verdict had it known of the perjury.[4] *Wallach I*, 935 F.2d at 458-559. See Pet. App. A4-A5.

4. After the convictions were reversed, the government agreed to dismiss the RICO counts, and each of petitioner's two co-defendants pleaded guilty to one of the remaining charges. Pet. App. A5. Petitioner moved to dismiss the indictment on double jeopardy grounds, as well as to recuse the district court judge and to disqualify the Assistant United States Attorneys who previously tried the case. The district court denied all of petitioner's motions. The court found petitioner's double jeopardy claim "frivolous" given the court of appeals' statements regarding retrial. *Id.* at A22-A32.

5. The court of appeals affirmed. Pet. App. A1-A19. Relying on this Court's decision in *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), the court suggested that the Double Jeopardy Clause may bar retrial of a defendant where the prosecutor deliberately engages in misconduct to avoid

[4] Judge Altimari concurred, stating that he did not believe that the prosecutors should have known that Guariglia was committing perjury at the time of trial. *Wallach I*, 935 F.2d at 473. He agreed with the court's alternative holding that reversal was necessary, however, because the jury probably would have changed its verdict if informed of the perjury. *Id.* at 475.

an expected acquittal. That principle, however, "avail[ed petitioner] nothing," the court held, because the prosecutors did not apprehend an acquittal, nor did they deliberately engage in misconduct. Pet. App. A6-A11.

The court also denied petitioner's "somewhat inconsistent" challenges to the sufficiency of the evidence at the first trial. Pet. App. A11. It rejected petitioner's claim that the prior panel had determined the evidence to be insufficient in holding that a jury probably would have acquitted petitioner had it known of Guariglia's perjury. The court explained that the prior panel's conclusion was based on an assessment of the weight, not the sufficiency, of the evidence. *Id.* at A11-A12. The court then examined the sufficiency of the evidence on the substantive charges. It held that Section 2314 does not require the government to prove that a shareholder was misled by the false representations made to the corporation in order to obtain property. A claim of "self-theft," the court held, is a "matter of defense." Pet. App. A13-A14.

ARGUMENT

1. a. Petitioner asks (Pet. 10-13) the Court to grant review to determine whether the government was required to prove that he deceived at least some of the corporation's directors or officers in order to demonstrate that petitioner took property from the corporation by fraud in violation of 18 U.S.C. 2314. Petitioner contends that the court of appeals' ruling on that issue conflicts with decisions of two other courts of appeals.

Petitioner's argument about the scope of Section 2314 is not ripe for review by this Court. If petitioner is acquitted following a retrial, his contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to

present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of petitioner's contention would be premature at this time.[5]

In any event, the court of appeals' decision does not conflict with *United States* v. *Gullett*, 713 F.2d 1203 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984), or *United States* v. *Burbank*, 848 F.2d 453 (4th Cir. 1988). All three decisions require the government to present evidence of both misrepresentation and detrimental reliance.

In *Gullett*, the Sixth Circuit affirmed the Section 2314 convictions of outside accountants who, together with the officers of various corporations, obtained funds from the corporations through a "parade of phony invoices and fictitious payees which were created in order to deceive uninvolved corporate officers and shareholders." 713 F.2d at 1210. The court found that the evidence established the two basic elements of fraud, misrepresentation and detrimental reliance:

> These false entries deliberately misrepresented the nature of the transactions *to the corporation as an entity* and hence to its owners, the shareholders, and its directors. In reliance on these false statements, *the corporation* made the payments.

Id. at 1211 (emphasis added). The use of the false invoices and false corporate entities to obtain corporate funds was, the court held, the taking of corporate property by fraud. *Ibid.*

Similarly, the court of appeals held in *Wallach I* that "when false information is intentionally provided to the

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[5] Although the interlocutory posture of this case would not weigh against immediate review of petitioner's double jeopardy claim, that claim warrants no further review for other reasons. See pp. 12-15, *infra*.

corporation, a fraud on the corporation and its shareholders is committed. Any monies dispersed to satisfy these false invoices, in our opinion, also have been procured by fraud." 935 F.2d at 468. On petitioner's second appeal, the court of appeals reiterated that "[i]mplicit in the prior opinion is the idea that the fraud upon the corporation is established by showing that the property was obtained by false representations made to the corporation." Pet. App. A14.[6] Thus, the Second and Sixth Circuits are in agreement on the proof required to demonstrate a violation of Section 2314. Indeed, in upholding the validity of the Section 2314 charges against petitioner, the court of appeals expressly relied upon *Gullett*. *Wallach I*, 935 F.2d at 468-469.[7]

The Fourth Circuit's decision in *United States* v. *Burbank*, 848 F.2d 453 (1988), is not to the contrary. In *Burbank* the defendant and his father were the sole directors, officers, and shareholders of Sure Fire

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[6] The court of appeals' statements recognize that Wedtech made the payments in reliance on the misrepresentations in the false invoices. Consequently, there is no basis for petitioner's assertion (Pet. 10) that under the court of appeals' construction of Section 2314 a person may be convicted for driving someone else's car across a state line even if there is no proof that it was done without the owner's consent.

[7] It makes no difference that some corporate officers were defrauded in *Gullett*. It is no less a fraud upon the corporation when all the officers—as here—rather than some of the officers—as in *Gullett*—are involved in the wrongdoing. See *Wallach I*, 935 F.2d at 468-469 ("Officers and directors do not have a license to plunder corporate treasuries acting individually or collectively."). Cf. *United States* v. *Weiss*, 752 F.2d 777, 785 (2d Cir.) (harm is no less injurious to corporation when directors are involved in wrongdoing), cert. denied, 474 U.S. 944 (1985); *Goldberg* v. *Meridor*, 567 F.2d 209, 215 (2d Cir. 1977) (in securities case, court refused to distinguish between case where directors are unanimous in wrongdoing and one in which they are not), cert. denied, 434 U.S. 1069 (1978).

Distributing, Inc. The defendant wrote checks from Sure Fire to a phony corporation and then had the checks deposited and cashed. After the defendant's father testified that he knew about the checks and that the cash was used to pay a seller who required cash, the court reversed the defendant's Section 2314 conviction. 848 F.2d at 454-455. The court held that the government had not met its burden of proving that the property was wrongfully appropriated: one cannot steal from oneself. *Id.* at 455.

The situation in *Burbank* differs from the situation in *Gullett* and in this case. In *Burbank*, unlike here, there was no evidence that any shareholder, director, or officer of the corporation unknowingly relied on the false invoices to make the payments. Rather, there was substantial evidence that the defendant and his father—the only shareholders, directors and officers—paid the checks knowing that they were false.[8] Consequently, neither the corporation nor its shareholders were deceived by the invoices in *Burbank*. In this case, in contrast, the false invoices ultimately deceived the corporation and its shareholders when, for example, they resulted in false SEC filings. *Burbank* thus provides no support for petitioner's claim of a conflict in the courts of appeals.[9] See also *United States* v. *Mitchell*, 877 F.2d

[8] Indeed, *Burbank* provides support for the statement of the court of appeals in this case that a claim of "self-theft" (*i.e.*, that all shareholders consented) is a matter of defense. See Pet. App. A14. The defense in *Burbank* was self-theft, based upon the testimony of defendant's father that the corporation was aware of and agreed to the payments. See *Burbank*, 848 F.2d at 455.

[9] Petitioner's reliance on *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749 (1991), is similarly misplaced. *Virginia Bankshares* involved the question whether minority shareholders whose votes were not required to authorize a corporate action subject to a proxy solicitation had an implied right of action under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C.

294, 302 n.9 (4th Cir. 1989) (in upholding wire fraud convictions, court stated that the fact that Wedtech officers were fully aware of the real purpose of the "retainer" payment to defendants merely meant that the fraud was perpetrated on the corporation and its shareholders, rather than on its officers).[10]

b. Petitioner further contends (Pet. 13-16) that the court of appeals' decision makes Section 2314 applicable to mere negligence. Petitioner ignores the fact that the jury was instructed that it could not convict the defendants unless it found that they had acted "wilfully and knowingly." Gov't C.A. Br. at 66, *Wallach I*. Moreover, petitioner overstates the reach of the court of appeals' decision. The court held only that petitioner took payments from Wedtech by fraud when he submitted invoices that intentionally misrepresented the nature of the work performed.[11] One of petitioner's invoices was written to conceal petitioner's involvement with

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78n(a), for false statements made in connection with a merger. The Court's decision was rooted in securities law and the rights of minority shareholders under state law.

[10] Petitioner's contention that the court of appeals created a second conflict in stating that proof of a "scheme to use corporate assets improperly" can support a conviction under Section 2314 is also unavailing. Pet. 12 n.4. The court referred to a scheme to misuse corporate assets only in concluding that it made no difference whether all or merely some of the corporate officers were involved in the scheme. See *Wallach I*, 935 F.2d at 468-469. In addition, petitioner misconstrues the decisions in *United States* v. *Rogers*, 786 F.2d 1000 (10th Cir. 1986), and *United States* v. *Carman*, 577 F.2d 556 (9th Cir. 1978). Those cases held that one can steal property in violation of Section 2314 only from someone with an ownership interest. Ownership is not an issue here.

[11] Although petitioner states (Pet. 10) the court of appeals held that a payment based on a "misstatement or omission in a bill or invoice" violates Section 2314, he ignores the fact that his invoices were much more egregious than "misbillings."

Wedtech while working (he anticipated) for the Department of Justice. *Wallach I*, 935 F.2d at 452. Such deliberately false invoices are in sharp contrast to mere negligence in billing, which clearly does not rise to the level of fraud. Nothing in the court's decision suggests otherwise.

c. Petitioner also contends (Pet. 16-18) that the court's construction of Section 2314 relieves the government of the burden of proof on the element of detrimental reliance, in violation of due process. That contention rests on a mischaracterization of both the court's holding and the evidence presented at trial. The government demonstrated that Wedtech relied on the false invoices to its detriment by showing that false submissions were made to the corporation in order to secure the corporate payments, and that the payments were made. The absence of detrimental reliance by particular officers or shareholders does not mean there has been no detrimental reliance by the corporation unless all the affected parties—officers, directors, and shareholders—are aware of and consent to the submission of the false invoices and the consequent false payments. The government thus met its burden of proof on the element of detrimental reliance.

2. Finally, petitioner asserts (Pet. 18-23) that in rejecting his claim that the Double Jeopardy Clause barred his retrial because of prosecutorial misconduct, the court of appeals erroneously applied a subjective test to determine whether the prosecutors deliberately engaged in misconduct to avoid an acquittal. That contention is without merit.

The Double Jeopardy Clause does not bar retrial of a defendant whose conviction is reversed because of a trial error (other than insufficiency of the evidence). *Lockhart* v. *Nelson*, 488 U.S. 33, 38-40 (1988); *Burks* v. *United States*, 437 U.S. 1, 14-15 (1978). To be sure, the Court has

held that the Double Jeopardy Clause protects a defendant against government actions that are intended to, and have the effect of "goading" the defendant into moving for a mistrial. See *Oregon* v. *Kennedy*, 456 U.S. at 676. Prosecutorial harassment or overreaching alone is no bar to retrial, however, unless the government intended to subvert the protections afforded by the Double Jeopardy Clause. *Ibid.* The prosecutor's intent may be inferred "from objective facts and circumstances." *Id.* at 675.

As the court of appeals recognized (Pet. App. A7), there is reason to doubt whether this Court "expected its carefully worded statement of the rule in *Kennedy* to be extended beyond the context of a trial that ends with the granting of a defendant's motion for a mistrial." In any event, even assuming that the Double Jeopardy Clause bars retrial where the prosecutor engages in misconduct intended to prevent an acquittal that the prosecutor believes is likely to occur without the misconduct, petitioner is entitled to no relief.

The court of appeals determined that the prosecutors did not intend to engage in misconduct to avoid an acquittal. First, as the court below stated:

> it is entirely unrealistic to think that the prosecution at [petitioner's] trial apprehended an acquittal. The evidence against [petitioner] and his co-defendants was quite strong. The prosecution had every reason to anticipate a conviction.

Pet. App. A9-A10.

Second, there was no evidence that the prosecutors had actual knowledge of Guariglia's perjury and thus intentionally engaged in misconduct. See *Wallach I*, 935 F.2d at 457. After Guariglia admitted on cross-examination that he had been to the Tropicana casino on two occasions during the fall of 1988, the government

questioned him extensively about whether he had gambled (and thus whether he had perjured himself at trial). *Ibid.* The government contacted the individuals Guariglia claimed had been with him on those two occasions, and those individuals corroborated his story. *Ibid.* The government also attempted to contact the Tropicana casino. *Ibid.* Based on this evidence, the court of appeals in *Wallach I* held merely that the prosecutors "should have known" of Guariglia's perjury.[12] *Wallach I*, 935 F.2d at 457. The panel below noted that "[e]ven the suggestion of possible conscious avoidance of knowledge was advanced most tentatively" by the *Wallach I* panel.[13] Pet. App. A10-A11.

The court therefore rejected petitioner's double jeopardy claim. Petitioner objects (Pet. 18) that in so doing, the court imposed upon him an "impossible burden," injecting a subjective state of mind requirement into the "objective" standard set out in *Kennedy*. Petitioner misstates the *Kennedy* standard. *Kennedy* held that in assessing a double jeopardy claim based upon prosecutorial misconduct, a court is to infer the pro-

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[12] Once the government became aware that Guariglia had perjured himself, it indicted him. See *Wallach I*, 935 F.2d at 456. The basis of the perjury conviction was not the Tropicana casino evidence, but evidence that Guariglia had gambled in Puerto Rico in November 1988. *Ibid.*

[13] Petitioner contends (Pet. 19) that the panel ignored the holding in *Wallach I* that "as a matter of law * * * had the jury been aware of [the] perjury it probably would have acquitted" petitioner. See 935 F.2d at 458. Petitioner interprets this statement by the *Wallach I* panel as a statement that the government knew Guariglia perjured himself, and allowed him to do so to avoid an acquittal: "No other conclusion is possible on the undisputed facts of record." Pet. 19. That argument confuses the question whether the government knew of Guariglia's perjury with the effect that the jury's awareness of the perjury would have had on the verdict.

secutor's intent from "objective" facts. *Kennedy*, 456 U.S. at 675. See also *id.* at 679-680 (Powell, J., concurring) ("subjective" intent). Inferring subjective intent from objective facts "is a familiar process in our criminal justice system." *Id.* at 675. In finding that an acquittal "was not in the mind of the prosecutors at any time" during petitioner's trial, Pet. App. A10, the court below was merely following the dictates of *Kennedy*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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